ABSTRACTS

SESSION 1: SETTING THE SCENE

By Cecilie Mauritzen

Climate change and why "business as usual" is not an option
The Intergovernmental Panel on Climate Change has five times concluded that mankind is impacting climate change. With more and more emphais the various panels have stated that mankind has even been dominating the change the past 40-50 years. The fifth assessment reported a very clear connection between accumulated CO_2 emissions since the beginning of the industrial revolution to the present, and found it relates nearly linearly with temperature increase. This finding is a tool for anyone attempting to take stock of historic responsibilities and, alternatively, of the how to divvy up the remaining possible emissions. Likewise, the report shows in clarity how the fossil fuel emissions are accelerating whereas the other key player – deforestation – has been reduced. Working with a set of possible scenarios the report shows significantly different futures depending on which emission pathway is "chosen".
Business-as-usual scenarios will take us extremely far away from the tipping point between manageable and unmanageable climate change, defined by the UN to lie around two degrees warmer than preindustrial. Twenty years of international negotiations under the auspices of the UNFCCC has shown clearly that the world cannot rely on a global agreement alone. Many other agreements must be sought simultaneously, agreements that depend heavily on coalitions of the willing.
A potentially powerful coalition is that of private industry. There are already many examples that private businesses find business opportunities in framing their transformation in terms of a "more beautiful future", rather than "avoiding a terrible future". It is of paramount importance for combatting climate change that private industry are able to follow this lead and transform to sustainable companies working for a sustainable future.

By Kate Raworth

What would it take to do business in the doughnut?
Humanity's challenge in the 21st century is to meet the human rights of all 7 billion people - soon rising to 9 billion - while avoiding tipping points in critical Earth system processes. This ambition of moving into the doughnut-spaced between social and planetary boundaries is a double challenge, with transgressions on both the social and environmental sides. It calls for far greater efficiency in humanity's use of resources, and far greater equity in the distribution of that resource use. It also calls for a new approach to business. Some leading companies are already using the framework of social and planetary boundaries as a strategic tool for their own sustainability targets, aiming to become 'doughnut brands'. But these initiatives are voluntary. What legal and cultural changes would it take to ensure that all companies were required by law to strategize in this way, and to move into the doughnut?

By Anders Wijkman

What should be the purpose of the economy?

SESSION 2:
REFORM PROPOSALS: CORPORATE PURPOSE AND DUTIES OF THE BOARD

By Andrew Johnston

Shareholder Primacy: The Main Company Law Barrier to Sustainability: Results of the cross-jurisdictional analysis of company law

This presentation gives the highlights of the Sustainable Companies Project's cross-jurisdictional core company analysis. Our analysis has shown that there is a great unexplored potential within the current company law regimes for companies to shift away from the path of "business as usual".

No company law system mandates the fundamentalist narrow version of shareholder profit maximisation that we see expressed in the quasi-legal social norm of shareholder primacy. That social norm is the most important barrier to core company law furthering sustainability. It is quasi-legal because it springs out of the company law focus – to a varying extent – on the position of shareholders. Shareholder primacy has been allowed to develop in the absence of an explicit legal statement setting out the purpose of the company and the company interest, leaving the competence and duty of the company organs, notably the board, vague. "Business as usual" is driven by shareholder primacy, but is actually detrimental to any shareholder with more than a very short-term perspective on their investment, including institutional investors such as pension funds. The shareholder primacy drive keeps us on a path-dependent track towards a very uncertain future.

Legal reform is necessary to change this, including an express redefinition of the purpose of the company and its implications for the role, duties and liability of the board. Such a reform could make more effective the external regulation of companies and realise the potential within each company to make its own independent, creative and active contribution to the transformation to sustainability.

By Tineke Lambooy

Enabling corporate boards to create sustainable companies: How can corporate law contribute? Meta-Study of recent empirical research in multiple disciplines concerning the connection between law, leadership and sustainability

In this article the authors will explore which role law can play in empowering the boards of companies in the transition towards becoming more sustainable. In particular, Dutch and Norwegian company law will be analysed. The basis for this article is the meta-study conducted by the authors of this article as part of the Sustainable Companies Project. The meta-study included a series of interviews with academic experts and the examination of recent empirical studies performed in various disciplines regarding the subject of company leadership and sustainability.

The meta-study is designed with reference to the recent empirical study conducted by Oslo University which focuses on the drive and motivation of board of directors of large companies towards environmental sustainability. In the meta-study, the authors identified recent empirical studies of universities and other research institutes from the Western hemisphere that address the connection between law, leadership and sustainability. Sustainability in this context is defined primarily in its environmental dimension.

In this article, the authors will first analyse the findings of the Meta-Study with a special reference to the definitions which were presented in the empirical studies concerning law, leadership and sustainability. Subsequently, they will identify (i) how law (either in the form of hard law or soft law) enables and promotes the connection between leadership and sustainability on a board level and (ii) to what extent corporate law supports company boards to put sustainability on the agenda. In this respect, while examining the provisions of the Dutch and Norwegian company law, the researchers will analyse a limited number of board instruments i.e. corporate purpose, decision-making processes, participation of stakeholders, board composition and transparency. The authors will conclude by making concrete suggestions about the role of the law and which legal instruments can help company boards to effectively put sustainability on the company agenda.

By Beate Sjåfjell

Upgrading the Nordic Model to the Sustainable Model. Defining the purpose of the company and the duties of the board

The most important challenge is how to combat shareholder primacy in a way that gives the competitive advantage to the companies that wish to pursue sustainable profit – financially, environmentally and socially. Legal reform is needed.

This paper presents the core of the legal reform proposal in a Nordic context, suggesting that the societal purpose of companies within the non-negotiable ecological planetary boundaries should be expressly set out in company law, with corresponding duties for the board. The duties for the board should include the supervision of the establishment, implementation and maintenance of life-cycle based analysis of the components of the core business of the company to identify the material negative environmental impacts of this business, and setting a strategy to redesign the business of the company accordingly. Further, the board's supervisory duty should encompass risk management systems through-out the company and due diligence systems throughout the company and any subsidiaries and regular suppliers or supply chains. A number of supportive measures are also proposed set into place.

If this is followed up, the Nordic region could become the cradle of the new, sustainable form of business, giving our region the market leaders of tomorrow.

By Andrew Johnston

Reforming English Company Law to Promote Sustainable Companies

English company law already allows company directors to take account of sustainability in their decision-making, but the corporate governance system gives them strong incentives not to do so. This article will argue that, if it is accepted that sustainability cannot be achieved through regulation, two main changes are necessary in English law. First, company law should be changed to require directors to identify and internalise the company's externalities. Second, significant changes to the corporate governance system, which incentivises corporate management to pursue short-term shareholder value as expressed in the share price, will be required. However, the article concludes that neither of these changes are likely whilst neoclassical economic ideology maintains its grip on policy-makers.

By David Millon

Promoting Sustainability Through Reform Of Delaware Company Law

Delaware law governs two-thirds of the largest US companies. Many lawyers, business leaders, investors, and academics assume that Delaware company law prevents senior-level company management from considering environmental sustainability when it appears to conflict with shareholder financial interests. In fact, this is not the case; Delaware company law – statute and common law – does not mandate shareholder primacy. Nevertheless, because of the prevalence of shareholder primacy assumptions among management and major shareholders, law reform may have a role to play in promoting sustainability. While significant law reform in this direction is unlikely in the current political environment, it nevertheless may be worthwhile to consider potential trajectories.

One possibility would be that Delaware enact a 'constituency' statute. These statutes provide expressly that company directors and senior officers possess the power to consider non-shareholder stakeholder interests when exercising their managerial authority. Although permissive rather than mandatory, they typically include a list of stakeholders and some state specifically that management is not required to prioritize shareholder interests. Forty-one states have enacted some version of constituency statute, but not Delaware. Such a statute could have the effect of liberating company management from the constraints of a shareholder primacy conception of managerial responsibility, and could encourage attention to environmental sustainability that otherwise might not occur.

However, even if such a statute were to be enacted (an unlikely prospect), it would probably have limited impact. Because shareholder primacy is not a legal requirement, the current legal regime does not stand in the way of managerial regard for environmental and other values that conflict with shareholders' interest. Rather, one important driver of managerial pursuit of short-term profit maximization is the set of incentives that reward such behaviour, including widely used equity-based compensation arrangements and substantial reputational pay-offs. Institutional shareholders also exert significant pressure. These investors — especially large pension funds and mutual funds — are themselves subject to strong legal or market-based incentives to maximize short-term return on the assets under their management. So, even though enactment of a constituency statute would represent a striking rebuke to shareholder primacy, such statutes are merely permissive and therefore do not present a significant counterweight to the extra-legal pressures that encourage shareholder primacy. The actual effects therefore are likely to be minimal.

By Blanaid Clarke

In the context of the sustainable companies agenda, is a Director Primacy Model more Beneficial than a Shareholder Empowerment Model?

This paper explores the benefits and drawbacks of the director primacy and the shareholder empowerment and engagement models to the sustainable companies agenda. In particular, it considers whether the changes promoted by the European Commission in the 2012 Company Law Action Plan will promote long term sustainability. It is argued that we need to re-evaluate the entire concept of shareholder engagement to ensure that if we opt for such a model, our expectations are realistic and that alternative checks, protections and even incentives are in place to achieve the desired end.

By Faizal Kurniawan

Integrating social and environmental responsibility in company law: The Indonesian example

Indonesia is a country which has many kinds of natural resource such as gold, oil, timber and gas mining. The number of exploration and exploitation of natural resources has huge impacts on environmental degradation such as deforestation and oil spill. These trigger Indonesian law maker to establish regulations on the Corporate Social Responsibility (CSR). Throughout the debate and controversy, the CSR concept is embedded into Article 74 Law Number 40 Year 2007 on Limited Liability Company (hereinafter called Indonesian company law), which requires the companies in doing business in the field of and/ or relation to natural resources to perform Environmental and Social Responsibility (ESR).

Indonesia is the only country in the world that makes CSR concept into a legal obligation. Yet, CSR norms stipulated in the Indonesian company law is known as ESR. ESR is a part -even narrower than- the concept of CSR. In practice, the application of Article 74 meets many legal obstacles encountered from the scope of the ESR regulation and the harmonization with other regulations, such as the Capital Market Law and the Environmental Law. Article 74 of the Indonesian company law and its Government Regulation Number 47 Year 2012 on ESR, does not provide the definite guidance to set up ESR program and the legal subjects who are burdened by CSR obligations. Then, the regulating norms of ESR take into consideration only on the environmental obligation.

This paper will elaborate *ratio legis* of Indonesian law maker to embody ESR into legal obligations and the elements of the ESR stipulations under regulations regarding with company law.

SESSION 3:
REFORM PROPOSALS: BOARD COMPOSITION AND DIRECTORS' DUTIES, INTERNAL CONTROL AND RISK MANAGEMENT

By Vincenzo Bavoso

Sustainable companies through enlightened boards: combining private and public interest in the decision-making of large public firms

This paper identifies two main corporate governance problems that have persisted for over a decade in the UK. The first is represented by flawed systems of control (both internal and external) over managerial behaviour. The second problem is reflected in the unresolved dilemma of the corporate objective whose urgency is magnified by the application of shareholder value as the parameter of corporate success. It is also asserted that these problems resulted from fundamental weaknesses in the governance system, namely the lack of necessary competences within board of directors (BoDs) and the effective independence of its members, whose intellectual bias impaired the balancing of different interests.

The paper highlights the need to redesign the structure of the BoDs in large public firms. It posits that structural changes are needed to recalibrate key decision-making processes in order to align them with more socially inclusive and sustainable goals. To achieve this, a new governance structure is advocated, encompassing an "enlightened" participation of the State in BoDs that would provide democratic legitimacy to corporate decision-making.

It is suggested that the inclusion of a public interest component in BoDs should occur via the State, which is identified as ultimate guardian of social interests because of its democratic underpinning. This public element would contribute to legitimising managerial power within society. More practically, it would constitute an ex ante mechanism to determine the firm's corporate objective and it would provide a gatekeeping function over decisions that have a negative impact on social interests.

By Shann Turnbull

Adopting the laws of nature to protect nature?

The research question is how might firms obtain the incentive to minimize any negative environmental impact arising from their business? One way is for the constitutions of firms to be amended, with or without a tax incentive, to integrate environmental stewardship into their governance architecture. Alternatively, laws could be introduced to allow citizens to become environmental co-regulators. To protect the property rights of investors and allow a nuanced efficient resolution of any conflicts between them and environmentally concerned stakeholders the constitutions of firms could be amended to separate the power to manage a business from the power to govern the firm. This allows the introduction of a network form of governance that is universally found in nature to allow creatures to sustain their existence. Network governance allows other stakeholders like employees, suppliers, distributors and customers to also voice their concerns to protect and further their interests by also becoming co-regulators with environmentalists. In this way network governance furthers self-governance to reduce the need for corporate laws, regulations, regulators, legal actions, standards and codes of practice. Democracy is enriched at the firm level while reducing the role, size and cost of governments.

By Gail Henderson

Balancing Profitability and Environmental Sustainability: Lessons from Canadian Human Rights Jurisprudence

This paper builds on the paper I presented at the first Sustainable Companies conference August 29-30, 2011. The earlier paper provided a general discussion of the benefits of imposing on directors a duty to minimize the corporation's environmental impacts. The question raised by this proposal is how directors are to balance a duty to minimize environmental impacts with their existing duties to the corporation. In other words, how far does the corporation have to go before it can claim to be "minimizing" its environmental impacts? In this paper, I suggest that the concept of "undue hardship" developed in Canadian human rights law could help to answer these questions. Under Canadian human rights law, businesses have a duty to accommodate human rights up to the point of "undue hardship". Similarly, a duty to minimize environmental impacts would require that corporate operations are undertaken in a manner that is the least environmentally harmful, unless the cost of doing so would cause the corporation "undue hardship". I argue that this approach would allow directors to balance profits and environmental protection in a way that would prevent one from trumping the other, and thus move the global economy a significant step closer to sustainable development.

By Carrie Bradshaw

Environmental Voice within Companies and Company Law: Environmental Management Systems (EMSs)

This paper explores the relationship between 'environmental voice' and the (albeit loose) 'environmental procedures' under UK company law. By environmental voice, I mean the advocacy of environmental concerns within corporate decision-making, and the associated salience (or not) afforded to environmental issues within business organisations. The starting point in locating this voice is the real individuals who comprise business organisations. However, a number of organisational, hierarchical and market factors can serve to 'mute' environmental voice within corporations. The challenge for corporate and environmental lawyers, I argue, is to find ways to limit these muting factors in order to open up space within companies for the expression and amplification of environmental voice. For a number of reasons, current company law procedures do little in this regard, and may in fact be damaging to genuine desires to improve corporate environmental performance.
In response, I consider the potential merits of mandating Environmental Management Systems (EMSs) via company law. Importantly, emerging empirical research points to the potential of EMSs to open up deliberative space within companies for the expression of environmental concerns and environmental value. For both practical and symbolic reasons, I suggest that the responsibility for instituting and ensuring the proper implementation of an EMS should be mandated via the codified regime of directors' duties. I use the EU's voluntary Eco-Management and Audit Scheme (EMAS) as an example of what the legal regulation of EMSs might look like.

By Idoya Ferrero-Ferrero

Comprehensive Management and Financial and Extra-financial Risk Control to Overcome the Business Crisis

In the current situation, the economic and social context is optimal for the application of the criteria for an integrated management of financial, environmental, social and governance of organizations. The crisis is an opportunity for a change in the management models, which may contribute a greater efficiency and effectiveness of political strategies and processes in organizations.
Of the multiple factors that have caused the financial crisis in which we are engaged, the lack of analysis, control and assessment of risk associated with financial assets and the lack of transparency in information systems had a remarkable influence on the economy. Taking into account every risk holistically and seeking a sustainable management, this study may provide a solution for a successful model change, incorporating into the risk management process financial and extra-financial variables. The proposed model aims to effectively manage the FESG (Financial, Environmental, Social and Governance) risks and create sustainable value over the long term.
Keywords: Financial, Environmental, Social and Governance Risks; Sustainability, Corporate Social Responsibility; Enterprise Risk Management.

By Sujayadi H. Suyayadi

An approach to the law enforcement on the corporate environmental and social responsibility in Indonesia

Indonesia takes another path on CSR. The Indonesian lawmaker has inserted CSR provisions as corporates obligation into Investment Act (Law No. 25/2007) and Limited Liability Act (Law No. 40/2007). However, these provisions do not provide any sanction against corporation which does not comply with such obligation. Government Regulation No. 47/2012, as implementing regulation, is also quite vague in regulating the sanction. As a legal obligation, any violation against it shall be enforced. If violation on CSR obligation committed by corporation, the State's Attorney on behalf of the State may lodge civil law suit on the ground that the corporation commits such unlawful act. On the other way, the people surrounding the operation site of the company which does not comply with CSR obligation also may sue the corporation in class action mechanism. In the recent years, some local governments have enacted local regulations to enhance the implementation of CSR in their region. The regulations are equipped with administrative sanction when the corporations do not comply with CSR obligation.

SESSION 4:
REFORM PROPOSALS: LESSONS TO BE LEARNED FROM LABOUR-CENTERED CORPORATE GOVERNANCE AND SOCIAL ENTREPRENEURSHIP

By Lorraine Talbot

Operationalizing sustainability in corporate law reform through a labour-centred corporate governance. A UK perspective

Section 172 of the UK's Companies Act 2006 states that it is a director's duty to promote the success of the company for the benefit of the members as a whole – a shareholder primacy goal that directly conflicts with social sustainability. However, reform of this section to enable social sustainability requires more than rewording as companies are manifestations of broader social forces. Using evidence from recent management studies on company forms and transaction costs in a global economy I show that companies are continually modifying their structures in order to better extract value from labour. Restructuring often includes outsourcing, a strategy which takes production out from the reach of company law. Thus in order to operationalize company law reform, broader contextual reform which enhances a labour-orientated corporate governance is required.

By Karsten Engsig Sørensen

Social enterprises: how should company law balance flexibility and credibility?

Social enterprises: how should company law balance flexibility and credibility?

In recent years, many countries have introduced special regimes to facilitate social enterprises. Many of these include special company law rules which may either provide for a special company form for social enterprises, or which are part of a certification scheme for such enterprises. This article analyses different solutions focusing on the US Benefit Corporations, the UK Community Interest Companies and the recently proposed Danish certification regime for social enterprises. The analyses focus on how the different systems have aimed at finding the right balance between flexible rules which are attractive to entrepreneurs and (social) investors, and rules which ensure that the brand used by social enterprises is credible. It is pointed out that the three systems are balancing these requirements quite differently, and pros and cons of the different solutions are discussed. It is concluded that a certification scheme seems preferable to a new company form, and several recommendations are made on how to find a system that is more credible than the US solution and more flexible than the UK and Danish solutions.

By Carol Liao

Catalytic Innovation and the Global Emergence of Hybrid Legal Structures

There is considerable legal scholarship focused on reforming the shareholder primacy model of governance embodied within the modern day corporation. While these efforts are worthwhile and must continue, there are certain ideological and practical limitations that make true reformation of this model difficult. It is important, therefore, that in the midst of ongoing efforts, one does not lose sight of available alternatives.

This article promotes a novel perspective that does not spring from traditional-style efforts of corporate reform, but rather, on how a growing trend in corporate law may create ‘catalytic innovations’ in the marketplace and foster an environment where sustainable companies eventually become the norm. This trend is the global emergence of corporate hybrid legal structures that are blending both for-profit and non-profit legal characteristics in their governance design. Corporate social responsibility (CSR) is getting a facelift in the private sector. Large multinational corporations are still catching onto CSR, but the leaders at the forefront of the movement are transforming the concept of CSR into one of ‘social innovation’ and the integration of business concepts with social activism. The growth of the ‘social enterprises’, a definition with no legal meaning that commonly refers to either a for-profit corporation trying to do social good, or an enterprising non-profit organization, is beginning to generate statutory responses in several countries. Legislators are beginning to create corporations with legal features that support social enterprises. With correct strategic implementation, corporate hybrids have the potential to challenge the status quo and force mainstream corporations to change how they operate.

By Aikaterini Argyrou

Innovative Legal Structures developed for Social Enterprises: Key Characteristics for designing Sustainable Companies

In recent years the notion of social entrepreneurship has been growing rapidly. By creating or managing new entrepreneurial ventures or organisations in an innovative way, social enterprises commonly devote their activities to achieving social objectives for the benefit of the community, the improvement of human well-being and environmental preservation. Examples are starting a restaurant in which jobless youths receive on-the-job training, paid work and a diploma (see the example of *Fifteen*, Jamie Oliver's restaurant in Amsterdam; at http://www.fifteen.nl/en.html), or selling bottled water and donating all the profits to an organisation that provides rural areas with water wells (see the example of *'Earth Water, you never drink alone'*, at http://www.earthwater.nl/). Their common characteristics are a mission-driven activity by delivering social value, an entrepreneurial orientation (usually small scale), financial self-sufficiency, and a participatory nature apart from being structured either for profit or non-profit.

Job creation is one of the important results of social entrepreneurship. Furthermore, entrepreneurial activities initiated and executed with a passion for sustainable development create awareness amongst a wider public and stimulate others to be also creative and to start activities with a positive effect on development.

Our research team (*Tineke Lambooy, Aikaterini Argyrou and Rosemarie Hordijk*) has analysed various innovative legal structures offered by corporate law (Belgium, Greece, the UK and a few other jurisdictions) in order to identify key characteristics that can stimulate and support the operationalization of social entrepreneurship. We regard the term 'sustainability' as it is described in the framework of the *Earth Charter*, the declaration of fundamental ethical principles for building a just, sustainable and peaceful global society in the 21st century (see: http://www.earthcharterinaction.org/content/).

Interestingly, this comparative analysis has revealed legal criteria that can support sustainable entrepreneurship. In that light, we will provide recommendations on how to adjust national and European regulation towards a more sustainable social entrepreneurship regime. Our proposition would be to further analyse these common criteria and examine to what extent they can also be applied to mainstream business organisations.

SESSION 5:
REFORM PROPOSALS: SUSTAINABLE GROUPS

By Tineke Lambooy

Cross-jurisdictional Analysis of Group Law: How can Group Law assist Multinational Companies in implementing Climate Change Mitigation Programmes?

As part of the Oslo University *Sustainable Companies Research Project*, we have analysed the company laws of approximately 25 jurisdictions to find out to what extent these laws support or obstruct multinational companies in integrating climate change mitigation programmes throughout the group of companies. We examined per jurisdiction questions pertaining to (i) the status and existence of group law, (ii) the legal structure of multinational enterprises, (iii) a common group policy, (iv) the rights and liabilities of a parent company in respect of exerting control over the group companies, and (v) exchange of information between group companies. We analysed the findings and distilled interesting regulatory approaches. We conclude with presenting innovative regulatory approaches that can assist a parent company's board in adopting a group climate change mitigation policy and programme, and implementing this in the group.

By Janet Dine

German Law on Company Groups as a Founding Principle for other Jurisdictions.

The Western world is in the grip in aggressive capitalist model invented by the modern neo-liberal economists but found originally in various religions characterised as a devil versus god struggle: material riches versus spiritual riches. Now Multinational Companies are often more powerful than many states leaving the International Human Rights structure in disarray because states are unable to control these actors. Numerous solutions have been mooted; universal jurisdictions; Corporate Social Responsibilities initiatives; voluntary Codes and the Ruggie initiative. However the power of MNE makes accountability very difficult especially when they hide their irresponsibility in complex structures in other jurisdictions. MNEs use jurisdictional arbitrage to avoid accountability. Some jurisdictions are becoming less likely to use the company veil to disguise Human Rights, environmental and labour violations. (see in UK the cases of Chandler v Cape and Petrodet v Prest) This paper will moot another national solution. Governments should control and regulate all of business enterprises in their jurisdiction, the parent company and all of the subsidiaries. An expanded German *Konzernrecht* (a system lifting the company veil in particular situations) could allow more transparency and accountability for Multinational companies. Such a system has been legislated in the Balkans (specifically in Albania) and if other jurisdiction could follow this model more sustainable capitalism could ensue. This paper will track other initiatives on company groups to see whether this is possible. Already the German *Konzernrecht* has been copied in Brazil, Portugal, Slovenia, Croatia, and Taiwan. Albanian law has added another aspect because it includes extraterritoriality.

By Surya Deva

Holding Parent Companies Accountable: Is Chandler's Direct Duty of Care Bypass a Solution?
The twin corporate law principles of separate corporate personality and limited liability tend to encourage parent companies to externalise risks associated with human rights violations committed by their subsidiaries. This paper will argue that it is critical to change the existing rules of the game so as to ensure that parent companies internalise 'non-financial' risks flowing from the operations of their corporate hands.
Considering that the existing legal tools to pierce the corporate veil are both inadequate and inefficient to hold parent companies accountable for human rights abuses committed by their subsidiaries, we should look for other alternatives. The paper will in particular consider whether the direct duty of care approach proposed by the UK Court of Appeal in *Chandler v Cape plc* could be a viable solution. It will be pointed out that while this approach offers some potential, it might not work in many situations. I will, therefore, propose that a parent company should be accountable for human rights violations by its subsidiaries as a matter of principle, unless the parent company can show that it did not know (or had no reasons to know) about the human rights violations in question, or that the violations took place despite taking appropriate preventive and redressive due diligence steps.

SESSION 6:
REFORM PROPOSALS: ACCOUNTING/REPORTING AND AUDITING/ASSURANCE

By Jukka Mähönen

Accounting, Auditing and Reporting: Supporting or Obstructing the Sustainable Companies Objective? Results of cross-jurisdictional analysis
Company and accounting law have a potentially important role in disciplining companies and directing them towards more sustainable behaviour. Disclosure requirements are of relevant to this objective. The purpose of our research is to explore the role of accounting, reporting and auditing in responding to the environmental sustainability crisis. The research focuses on the reporting and auditing requirements regarding the impact of corporate activity on the environment.
According to our research, the development of sustainability reporting is crucial for supporting business actors to improve corporate social responsibility. Across the jurisdictions represented in the Sustainable Companies Project, there is a strong and well-established corporate financial accounting culture. Some jurisdictions appear to be more advanced than others, however, in environmental or sustainability accounting. Whilst recognition of the potential relevance of accounting to improvement of environmental performance might indicate that accounting and reporting could improve sustainable corporate behaviour, these mechanisms may also hinder such improvements. This chapter explores the barriers and possibilities for improved sustainability through accounting and reporting as well as related audit and other assurance processes.
Through cross-jurisdictional analysis, our research will help identify a more progressive role for sustainability related reporting and auditing. This goal requires going beyond the conventional accounting and reporting methods of financial and cost accounting. A major step forward can be identified in the efforts towards *integrated reporting* (IR).
More emphasis must also be given to the audit and verification of information published. This requires more standardization and legislative actions, even mandatory rules on compulsory assurance.

By Charlotte Villiers

The potential of integrated reporting for sustainable companies
In this paper I will identify some of the problems around company reporting for sustainability. Traditional accounting does not provide the informational basis for bringing about change in corporate

behaviour. The new concept of the integrated report promises to be more effective by providing holistic information that shows the links between financial performance and sustainability performance. Integrated reporting has the potential to contribute to the protection of the planet socially and environmentally, by enabling corporate actors to reflect on the consequences of their activities not just financially but in terms of sustainability also. This paper explains the concept of integrated reporting which is in its earliest phase. I will talk about the features of integrated reporting and I will explore the potential benefits and the limitations and challenges in achieving effective integrated reports. My paper urges greater involvement of stakeholders, NGOs and civil society in the development of the framework for integrated reporting. It is necessary to move beyond voluntary integrated reporting and to provide standards, guidance and a system of assurance. Integrated reporting must not be about 'business as usual' and must not be captured for the sake of the business case or for financial value creation. To be effective, integrated reporting will require honest self-reflection and a willingness to alter behaviour if the reporting process shows that to be necessary.

By Rapahel J Heffron

Energy Subsidy Reporting: its creation and enforcement through International Financial Reporting Standards (IFRS)

Subsidies within the Energy Sector are highly complex and hard to analyze. In many cases it is difficult to determine the amount of subsides received by different organizations in each of the energy fields. The true cost of different energy sources is therefore difficult to calculate and compare. It is proposed that the introduction of an IFRS could be drawn up by the International Accounting Standards Board to address this issue in requiring energy companies to disclose subsidies received by energy sector.

This new accounting standard could significantly contribute to determining the true cost of energy by sector and allow for comparisons. This in turn would provide data for organizations and Governments to take more informed decisions on the future of energy sectors and contribute to achieving a more sustainable economy. This paper asserts that energy subsidies are highly significant for energy companies in the fossil fuel industry but that it is difficult to access this data currently. While an IFRS is not legally enforceable, once in place, it could be enforced through adoption at a national company law level by each country or for example within the EU.

The effect could be transformative in nature, and permit a more equitable and informed subsidy system among energy sources to be developed. In particular, low carbon energy technology companies would stand to significantly gain from a redistribution of energy subsidies. This change is subtle in nature and achievable through its adoption as an IFRS and subsequent or concurrent enactment in national company law legislation that could result in disclosure of this information within a short time period.

By David Monciardini

Regulating Accounting for Sustainable Companies

On 16 April 2013 the EU Commission published its much anticipated proposal for a new Directive on 'non-financial reporting' (NFR), to be adopted in 2014. The paper suggests that the framework used by the Commission is rather weak and improvements are proposed, on the basis of a series of interviews with key stakeholders and policy-makers; documents' analysis; and a participant observation at DG Internal Market. It maintains that the current proposal is based on a fundamental misconception of the 'symbolic power' of accounting rules. Drawing on a growing strand of critical accounting studies, it suggests that accounting standards need to be understood not as merely reflecting reality but as a powerful tool to order and construct business reality. Adopting this perspective, the paper suggests lawmakers a broader and more dynamic role in developing corporate sustainability reporting. For instance, it suggests that national 'sustainability codes', similarly to the 'German Sustainability Code', should be developed as credible frameworks for comply-or-explain NFR. Furthermore, it suggests shifting the attention to large institutional investors, conventionally treated as the principal 'users' of NFR. They should be required to disclose more and better information on their ESG policies, creating a 'domino effect' on the companies in which they invest.

By Yuri Biondi

Better accounting for corporate shareholding and environmental protection
In the last three decades, corporate governance and reporting have been confronted to a drift toward shareholders' primacy and value, and the revival of old-fashioned proprietary views against entity views on the business firm. This paper develops an entity-based perspective of the relationship between shareholding and the inner congeries of the enterprise entity. These congeries require an accounting system, instead of a market price system, to deal with. To better represent and control that relationship, an entity-based approach introduces a functional segregation between shareholders' income and equity from income and equity to the enterprise entity. This distinction is especially important in view of fulfilling fiduciary responsibility, avoiding misappropriation and enforcing the fairness and integrity of corporate joint concern. Absent this distinction, accounting systems might enable corporate Ponzi schemes (through and behind the corporate shield) led by insiders (either executive management or controlling block-holders) to the detriment of other stakeholders, including outside shareholders, and the continuity of the business enterprise over time. This entity-based perspective provides some institutional economic insights and a viable solution to the evergreen controversy in corporate social responsibility, in view to balance shareholding rights and obligations with other stakeholders' interests and the general interest, including environmental protection and social communities support. Drawing upon this perspective, improvements to current European accounting regulation for environmental liability provisioning are developed through capitalization and securitization of nominal estimates of future expenditure to cover environmental future costs which are voluntary or compulsory committed.

By Amanda Sonnerfeldt

Regulating third party assurance engagements on sustainability reports in Sweden – issues and challenges
The well-institutionalised notion of an audit puts forth that information subjected to independent examination by third parties potentially contribute to better quality information for decision making (towards more sustainable companies?). The presence of different assurance providers offering a myriad of services in the name of "sustainability assurance" led to concerns about their quality and comparability and as a consequence, a call for standards to regulate these services. This study analyses how standards by the accountancy profession interplay with hard law to regulate assurance engagements on sustainability reports in Sweden. Sustainability assurance engagements by the accountancy profession are performed according to RevR6, developed based on international standards representing the accountancy profession's commercial logic and conceptual understanding of assurance. These engagements are however potentially "supervised" by the Supervisory Board of Accountants (RN), whose role could apply by default due to the arguable over-inclusive definition of "audit business" in the Swedish Auditors Act. As RevR6 only serve as "guidance material" to legal institutions, these engagements are supervised according to the legal audit concept and auditors' role as professional trustees. The fragmentation of regulatory systems, within which sustainability assurance engagements operate leads to legal uncertainty and systemic challenges. It is crucial for legal institutions to better deal with the lack of clarity through regulatory conversations or other means to better coordinate or steer the emergence of regulatory initiatives by private organisations in these new "audit like" services. It is crucial as it clarifies the role assurance services should play in the drive towards more sustainable companies.

SESSION 7:
REFORM PROPOSALS: SUSTAINABLE INVESTORS

By Benjamin Richardson

Reforming Finance Capitalism for Sustainability

In my earlier contributions to the Sustainable Companies Project, I explained how financial markets have become an increasingly significant influence on corporate environmental behaviour. That influence is often negative, but it is also occasionally benign and positive, such as through the growing movement for socially responsible investing (SRI).

This is not the time to rehearse my environmental critique of the financial economy. Rather, I now sketch some ideas for reform in order to make the financial sector a more positive influence. We need legal reform, because despite growing publicity about SRI's growth and impacts, most financiers remain unchanged, and any evaluation of environmental impact, even by avowed social investors, tends to be made narrowly for immediate financial advantage.

In this presentation I discuss two potential reforms that address private financial institutions and aim to stimulate a more socially responsible market.

First, we need to modernize fiduciary finance law to recognize the symbiotic relationship between the sustainability of the economy and those who invest in it. A bold step would be to reformulate the duty of prudent investing to shift the market convention towards an enlightened, long-term focus that incorporates respect for the environmental conditions that underpin a prosperous investment universe.

Second, a space within and among financial institutions is needed to allow for consultation, debate and reflection on how to practice long-term investing for sustainability. The hallmarks of good prudential investing should include such consultative processes, in the same manner that investors increasingly see engagement and dialogue with their portfolio companies as best fiduciary practice.

By Celia Taylor

Possible Reforms to US Law to Compel Climate Change Disclosure

At present there is no mandatory federal securities law in the United States that focuses specifically on climate change disclosure. In 2010, the US Securities Exchange Commission issued Guidance Related to Climate Change to provide guidance to public companies regarding the Commission's existing disclosure requirements as they apply to climate change matters. The purpose of the Climate Change Guidance was to indicate to issuers where within already required disclosures matters relating to climate change. Specifically, the Commission briefly described the most pertinent non-financial statement disclosure rules that may require disclosure related to climate change. SEC Guidance is permissive, not mandatory and each issuer is free to determine whether to make disclosure of issues discussed in a guide. Therefore, although the 2010 Guidance strongly encouraged issuers to disclose matters relating to climate in change in several portions of their public filings, issuers were not compelled to do so.

In recent years Congress has proved increasingly willing to require the SEC to address directly through disclosure regulation matters of political and social importance in addition to the agency's usual financial and corporate governance responsibilities. Specific examples of this include provisions in the Dodd-Frank Act requiring the SEC to promulgate disclosure regulation concerning conflict minerals and payment practices in the resource extractive industries. Given this trend it would be theoretically possible for the US Congress to require the SEC to draft rules that would require specific, focused climate change disclosure. Such a specific mandate would remove discretion from an individual issuer and might provide clearer and easily accessible information to investors and others if climate change disclosure is given independent position within filed documents rather than being buried in other sections.

There are risks to this approach that must be considered. SEC rulemaking is increasingly coming under attack by business and other groups on the ground (among other complaints) that new rules impose improper financial burdens on issuers. In addition Chairman White of the SEC has in several recent speeches voiced concern that the SEC is being tasked with too much disclosure regulation obligations. Finally, even if the US Congress did require mandatory climate change disclosure, issuers might simply resort to bland, non-informative narrative. Disclosure regulations would need to be drafted with care to minimize the ability of issuers to greenwash their practices.

By Tomasz Regucki

CSR stock indices as a way of promoting sustainable development principles. The empirical analysis of Warsaw Stock Exchange RESPECT index

The idea of stock index which would refer to CSR ideas is quite recent. The first such index was introduced on New York Stock Exchange in 1999. Since that time several dozen CSR indices appeared on numerous stock exchanges worldwide. The aim of these products is to promote the sustainable investments ideas by creating the benchmark for sustainable companies as well as to provide the reference for investors, who invest according to Socially Responsible Investing (SRI) principles.

One of such indices is Warsaw Stock Exchange RESPECT index. It was introduced in 2009 as a first CSR index in Central and Eastern Europe. The aim of the study is to provide wide analysis regarding RESPECT index using legal perspective, statistics and econometrics.

The paper will consist of three parts. The first part will briefly present the idea of CSR indices worldwide. The second part will focus on RESPECT index itself including the details of its construction. The third part, which is the most important part of the paper, will present statistical analysis regarding companies in RESPECT index. It will statistically examine the impact of inclusion of a company in the index on turnover value of company's shares. Such analysis is aimed at answering the question of actual market response to CSR index. The paper will conclude with some policy recommendations regarding CSR indices.

By Georgina Tsagas

The Delphic Oracle for the EU Takeover Directive: A closer look at the UK Debate

The long-awaited study on the application of the EU Takeover Directive was finally published in June 2012. The Study offers a good level of insight on the rationale and application of the Takeover Directive's provisions, but falls short in terms of offering concrete proposals to reform the Takeover Directive's problematic articles. The Takeover Directive is deficient insofar as it adopts a minimum harmonisation standards approach towards regulation, affords excess flexibility to Member States in adopting its provisions and encompasses provisions which do not adequately regulate the role of the target board, disclosure requirements, employees' rights and enforcement related matters. Such deficiencies by extension bar the Commission from reaching the objectives of providing legal certainty, facilitating takeovers and adequately protecting the interests of shareholders and others during the takeover process. Are there viable ways to move forward with the revision of the Takeover Directive? Is it better to adopt a cautious approach when considering its reform? The presentation considers avenues via which to secure answers to these questions and draws inspiration from the UK's latest takeover law reform debate. In a quest to improve the operation of the Directive at EU level the paper proposes the reform of the Directive's substantive rules and mode of regulation following the concerns raised during the UK debate on the reform of the UK Code on Takeovers and Mergers in 2011.

By Anita M. Halvorssen and Cody D. Eldredge

Investing in Sustainability: Ethics Guidelines and the Norwegian Sovereign Wealth Fund

By participating in global investment markets, the Norwegian Sovereign Wealth Fund (formally the Government Pension Fund – Global (GPFG)), through its Council on Ethics encourages companies in its investment portfolio to align their corporate behavior with the GPFG's Ethics Guidelines, which are based on international sustainability standards. By buying and selling securities as a private investor and subsequently using its shareholder leverage, Norway is influencing the behavior of corporations in an effort to place them on the path to sustainability while still accumulating maximum possible benefits for present and future generations.

To date, there has been little empirical analysis examining the effectiveness of the Council on Ethics in implementing its ethics guidelines in a manner that facilitates sustainable corporate behavior. We present evidence showing that the Council on Ethics is successful under certain circumstances in encouraging corporations to adopt more sustainable practices. Specifically, we show that the Council on Ethics is more effective in influencing corporate behavior as the relative size of the GPFG's investment in a given corporation increases. Our findings suggest that the ability of the GPFG to influence corporate behavior is significantly magnified by small relative increases in the size of the GPFG's investment in that firm. Given its rate of success in motivating sustainable corporate behavior, the GPFG serves as a model for other institutional investors who may wish to implement ethics guidelines targeting the behavior of corporations in their investment portfolios.

Although the GPFG has succeeded in facilitating sustainable behavior while contributing to the development of best practices for responsible investors, we also suggest several reform proposals for improving the overall effectiveness of the GPFG in implementing its Ethics Guidelines. These include: expanding the grounds for exclusion to include, among others, companies that produce energy from fossil fuels, or at the very least energy production from coal and tar sands; granting the Council on Ethics more bureaucratic autonomy; increasing the level of transparency in the active ownership of the investment arm of the GPFG, including their informal engagement with companies; and lastly, amending the mandate for the investment arm, requiring it to fully consider the OECD Guidelines for Multinational Enterprises when managing the companies currently within its investment portfolio, prioritizing companies for assessment when they present a significant risk of actual or potential adverse environmental or social impacts.

By Arild Skedsmo

Shifting big finance from fossil to renewable – the role of the Norwegian Pension Fund

The Norwegian Government Pension Fund Global (GPFG) is the biggest sovereign wealth fund in the world. Through this position, the fund has a direct impact on global development through its investments, as well as an opportunity to be a role-model and set new standards for responsible investment. A WWF analysis shows that the GPFG has invested approximately 10% of its equity portfolio in 147 of the world's 200 most carbon rich companies, evaluated by their fossil fuel reserves. Corresponding Norwegian ownership in the fossil reserves constitutes 108 times Norway's annual GHG emission in 2010.

Furthermore, currently the Fund has only limited investments in renewable energy. Given that at least two thirds of all present fossil reserves must remain in the ground to have a reasonable chance to stay below two degrees global warming, warnings has been raised regarding a possible overrating of fossil fuel companies and the related financial risk to the GPFG. This economic risk is further exacerbated when considering Norway's total exposure to fossil fuel assets, including the State's direct financial interest and ownership in Statoil, in addition to the financial inflows to the GPFG and the funds stock portfolio.

Beyond the financial risks, WWF is advocating the need to shift investments from fossil to renewable sources of energy as a critical contribution to alleviating the most dangerous consequences climate change. A first step - recommended jointly by a broad coalition of civil society actors, investors and private business - is to allocate up to 5% of the fund to direct investment in infrastructure for the production and distribution of clean energy. Coupled with a divestment in the worst types of fossil fuels, the GPFG can help unleash the global shift in investments from fossil to renewable sources of energy – imperative to get the world on track to a more sustainable future.

By Ivo Mulder

Fixed on Natural Capital: Hardwiring Environmental Factors in Bond Markets
Despite being a more passive asset class than equities, corporate and sovereign bond markets combined are about twice as large as all public equity markets together. The academic community, consulting firms, research institutes and others, however, has focused most of their attention on building a business case for equity investors to factor in environmental, social and governance (ESG) criteria in their investment analysis and decision-making. But the case for fixed income is arguably the most straightforward of them all because risk mitigation is a key component of this type of investing. Whereas equity investors primarily look for growth and are ready to assume a certain degree of risk, holders of fixed income assets are more concerned with risk reduction as opposed to return enhancement. In this presentation I will present the key results of a joint project that UNEP FI and Global Footprint Network undertook in 2012 called 'E-RISC: A New Angle on Sovereign Credit Risk'. The presentation features key conclusions of the project, our plans to continue it in 2014, and a general case for researchers to broaden their horizon to include bond markets. By hardwiring ESG factors not only in public and private equities, but also in the way bond securities are valued in primary and secondary markets, a stronger ripple effect will be created to advance sustainability in the broader corporate sector.

SESSION 8:
REFORM PROPOSALS: OTHER INCENTIVES AND FACILITATING MEASURES

By Jianbo Lou

Environmental Auditing at the Closure of Business
The pollution caused by the activities of a company, not necessary detected on time, may last even after their closure. An environmental auditing at the closure of a company might be a useful mechanism to make sure that a company cannot get away from the liabilities simply by closing its business. Moreover, it may form a basis for liability for the directors of the board or the shareholders of the company.

By Blanca Mamutse

Reforming insolvency law to promote environmental interests
'The difficulties attendant on administering a corporate insolvency, in particular the orderly and expeditious distribution of limited assets is brought into sharp focus where environmental obligations are involved. Environmental obligations are often of a continuing nature, demand full compliance, and cannot always be comprehensively ascertained or quantified. Notwithstanding the prominence enjoyed by environmental concerns in international and domestic law, the challenge of resolving the tension between the competing objectives of environmental and insolvency law has been met by the courts rather than the legislature in many common law jurisdictions. This paper considers the options for providing formal protection of environmental interests in insolvency, and argues in favour of the adoption of a comprehensive framework rather than discrete solutions such as financial security or priority in insolvency distribution.'

By Erik Røsæg

Contracts as environmental culprits
Contracts can be utilized to organize both sustainable and non-sustainable activities, pursuant to the wishes of the parties. In some cases, however, the incentive structure or the inflexibility of the contracts leads to non-sustainable results, even if not particularly desired by the involved parties. One example is the queuing system in ports for cargo ships, which often disfavour slow steaming.
I have studied a number of shipping contracts of different kinds, unique samples of both individual contracts and chains of contracts, and have identified a number of structures that may lead to unintended non-sustainable results. The paper will demonstrate this kind of analysis of contracts and contract chains, and advise on how to resolve the problems. The remedy is not likely to be legislation, but education.

By Endre Stavang

The environmental option
We introduce an innovative market-based mechanism that may be used to advance environmental goals. Our mechanism employs option theory to give established businesses a financial stake in the success of green technologies. We show why and how green companies should be given an option to transfer a block of their shares to any corporation of their choice, incentivize them to switch to environmentally friendly technologies and to use their political clout to alleviate legal, regulatory and political barriers to the adoption of such technologies. In short, giving established corporations a stake in green companies will give them a stake in the environment.
Specifically, we propose enacting legislation that will empower green companies that meet certain conditions to transfer a call option to buy a block of its shares to an established company of their choice. The option will be given for free; the established company that receives the option will not have to pay anything for it initially. The exercise price will be the price of the green company's share at the time of the transfer and the receiving company will have a period of five years to exercise. We call this mechanism the "environmental option." From a legal standpoint, the mechanism we propose is not unprecedented, so our proposed scheme is not overtly intrusive, nor should it be very controversial. Furthermore, we believe that this risk is worth taking given the proposal's potential upside.

By Johanna Rosenqvist

Mandatory insurance as an instrument of control for "greener" business
"Preventing and remedying, insofar as is possible, environmental damage contributes to implementing the objectives and principles of the Community's environment policy as set out in the Treaty."
The Environmental Liability Directive is based on the polluter pays principle; it holds operators of operational activities that have caused or imminently threat to cause certain environmental damage financially liable. Under the ELD there is no duty for the operators to hold ex ante financial security. There is thus no guarantee that operators will be able to pay for remedying and preventing environmental damage. On a practical level this means that, even if implemented adequately, the ELD risks to fail to promote sustainable development, and thereby also risks to undermine the wider aim of the ELD itself. Thus, in this context, the ELD probably needs to be altered. How?
One way to ensure that environmental damage under the ELD will be remedied and prevented in a manner that allows the ELD to become a regulation that de facto contributes to the "*objectives and principles of the Community's environment policy*"(encompassing the environmental aspect of

sustainable development: a high level of protection and improvement of the quality of the environment (Article 3, TEU)) would be for the EU to introduce mandatory insurance. Mandatory insurance would in this context not only be used as an instrument to ensure financial coverage in the case of environmental damage, but also as a way to control operational activities towards sustainable development through utilising insurance functions and principles in line with sustainable development, encompassing an aim to incentivise operators to risk-reduce, thereby opening for "greener business".

In summary this paper addresses environmental damage as an effect of unsustainable business. The paper encompasses a reform proposal that consists of introducing ex ante mandatory insurance under the ELD, through amending Article 8(1) of the same directive, obligating operators to not only bear the cost for environmental damage, but to do so through insurance. This is done in order to pave the way for "sustainable insurance": If addressed from the perspective of sustainable development, insurance holds the possibility to ensure that environmental damage is remedied adequately and to induce and incentivise operators to change their behaviour in a risk-reducing manner, in order for them to become more "green".

The reform proposal is based on an analysis of the ELD, of insurance principles and insurance functions, as well as on mandatory insurance as such, all in the context of sustainable development. Research within these different areas, as well as the preparatory work for the coming into being of both the ELD and the Swedish Environmental Code (Miljöbalken), are of specific interest as a basis for the line of argument in this paper.

By Mark Taylor

Due diligence: a compliance standard for responsible European business

Since 2011, changes in the international norms governing human rights and business have gained traction, influencing European approaches to policies and laws governing socially sustainable business. The UN Guiding Principles on Business and Human Rights have defined business responsibility and introduced the concept of due diligence by business as the procedural standard through which a business should act responsibly. How well do the new standards fit with existing European law and policy governing responsible business? The paper will summarize comparative law research which found due diligence provisions in EU and Member State legal provisions (De Schutter et al, 2012) and assess recent developments in EU law and policy to argue that due diligence is emerging as a European standard of compliance for responsible business.

SESSION 9:
REFORM PROPOSALS: SUPPORTING THE SHIFT TOWARDS SUSTAINABLE COMPANIES

By Priscilla Schwartz

Corporate 'Socialising' and Environmental Sustainability in Africa

The practice of CSR especially in mineral exploitation in African countries places much emphasis on community social needs as a corporate responsibility and a subdued focus on the costlier long term environmental impacts outside environmental impact assessment (EIA). The main challenge is in the balancing of the 'social' interest with environmental sustainability and the apportionment of social responsibility between mining companies and host governments. The paper calls *inter alia* for a renewed mining focus that promotes the redirection of investment into environmental protection and management and related technologies and to cub the overwhelming company 'good will' social causes. There is need to encourage host states to address mining and social policy within a more strategic planning system. It will enhance environmental sustainability if host governments and mining corporations develop the practice of submitting annual reports to an independent agency in the host country, explaining how their policies, operations and investment comply with, or enhance the environmental-specific legal requirements, conditions, policies and best practice.

By Peter Appel

Sustainable Commerce: Private Ordering Systems Enable Multi-National Businesses to Enhance Corporate Profitability, Minimize Environmental Impacts, and Control Corporate Risk

Sustainable commerce—products and practices that minimize environmental impacts and optimize commercial value while realizing both public and private environmental benchmarks— has become an integral corporate management principle that drives successful international commercial enterprises in various sectors. In previous decades, profit-and-loss metrics often made up the singular measurement of performance. Now, external business performance evaluations—by stakeholders, ratings agencies, or the financial and investment community—include sustainable commerce benchmarks, e.g., whether firms provide goods and services that reuse and recycle natural resources or whether global operations minimize pollutant emissions and corporate carbon footprints. Questions remain, however, within the business community regarding the optimum combination of private sector, legal, regulatory, and risk management tools by which industry and government can affect sustainable commerce initiatives. Most scholarship to date has focused on public ordering systems implemented through international, national, or subnational regulatory regimes as means to drive corporate behaviour to implement end-of-pipe, command-and-control driven environmental programs. The increasing role of private ordering systems—including private assurance and corporate management systems— has largely been absent from this discussion. These are tools used by multinational businesses to craft successful sustainable commerce initiatives which reduce corporate environmental and natural resource impacts. This paper details case studies of sustainable commerce initiatives incorporating private ordering systems which:

• minimize environmental impacts of corporate goods, services and operations;
• control corporate operational and financial risks; and
• enhance corporate profitability, competitiveness, and global market share.

It will demonstrate how private ordering systems have supplemented, and, more importantly, have increasingly supplanted command-and-control systems in the US.

By Marcia Narine

Climate Change and Company Law in the United States: Using Procurement, Pay and Policy Changes to Influence Corporate Behavior

In September 2013, the UN published the Intergovernmental Panel on Climate Change's report, which concludes, based on the research of over 800 scientists, that there is a 95% certainty that climate change is caused by human activity. Nearly 700 US companies have signed a declaration stating, "Tackling climate change is one of the greatest American economic opportunities of the 21st century." While many companies have already set sustainability goals and the President has proposed climate change legislation, the political "climate" in the United States is inhospitable to meaningful changes in US environmental law. Many of the Environmental Protection Agency's regulations are under attack by Congress and certain states through protracted litigation, and based on the US system of campaign financing where corporations donate to the legislators that write the laws regulating them, it is unlikely that corporate law will change either, at least at the federal level.

Therefore companies may need government incentives. The federal government has significant leverage. This article proposes that the federal government (1) use its power as the largest buyer of goods and services to strengthen green procurement standards and (2) add contractual requirements of audited executive attestations and clawbacks of executive and board compensation for failure to adhere to certain sustainability standards. Using incentives and penalties can fill the gap until the government is ready and able to change US law.

By Anja Wiesbrock

Reforming State Aid as a Part of the Framework for Sustainable Companies

This paper explores the significance of the environmental integration obligation, imposed by Article 11 TFEU, on European State Aid law and policy. State aid can play an important role in responding to market failures linked to negative environmental externalities by expressing a preference for more environmentally friendly economic activities. There is little doubt that the environmental integration implies a duty to permit exemptions from the prohibition of state aid contained in Article 107 TFEU in order to correct market failures. The major challenge relates to the question of how state aid can be employed most effectively in order to ensure a higher level of environmental protection than would be achieved without the aid. At the same time it must be guaranteed that positive effects of the aid outweigh its potentially adverse effects on competition and trade between Member States. The paper argues that the current EU state aid regime is not adequately equipped to guarantee the high level of protection and improvement of the quality of the environment envisaged by Article 3 TEU. In particular, the current white-list approach is not flexible enough to accommodate various new forms of environmental aid and should be replaced by an economic assessment of environmental state aid measures based on market failure.